

EXHIBIT 6



Via Email Only

October 6, 2023

Marcia Lowry
355 Lexington Ave, Floor 16
New York, NY 10017

RE: ESI Proposal

Dear Counsel:

We write to report on the results of the ESI search for the search terms and 40 custodians that Plaintiffs requested on September 5, and to provide a proposal for production.

1. Document “Hits” for Plaintiffs’ Proposed Search Terms

Plaintiffs’ requested search terms¹ for the following 27 custodians produced 630,172 de-duplicated documents (including family members):²

- | | |
|------------------------|---|
| 1. Allison Adler | 15. Paula Ullom |
| 2. Amy Hymes | 16. Rae Bates |
| 3. Cammie Chapman | 17. Rebecah Carson |
| 4. Cindy Moore | 18. Shaun Charles |
| 5. Cree Lemasters | 19. Sherri Young |
| 6. Cynthia Persily | 20. Susan Richards |
| 7. Heather Grogg | 21. Tina Mitchell |
| 8. Jeffrey Pack | 22. William Belcher |
| 9. Jeremiah Samples | 23. Bill Crouch (limited PST files, see below) |
| 10. Justin Davis | 24. Kevin Henson (limited PST files, see below) |
| 11. Kellie Littlefield | 25. Laura Barno (limited PST files, see below) |
| 12. Lance Whaley | 26. Linda Watts (limited PST files, see below) |
| 13. Laura Scarberry | 27. Tanny O’Connell(limited PST files, see below) |
| 14. Melanie Urquhart | |

¹ Defendants made four non-substantive changes to the search terms’ syntax to allow them to be run in Defendants’ document management system. Specifically, Defendants (1) replaced “/s” with “/15” to indicate the two terms will be within 15 terms of each other, because Defendants’ system does not have capability to search for terms within the same sentence; (2) deleted “OR” after “workgroup” in the following term: (“QAPIS” OR “quality assurance and performance improvement system”) OR (“workgroup” OR) AND (“sample” OR “statistic*” OR “DOJ”)); (3) added “OR” to the following term: (“plac*” OR “approv*” OR “put*”) AND (“kin”); (4) added “OR” to the following term: (“plac*” OR “approv*” OR “put*”) AND (“kin”) AND (“cert*” OR “formal” OR “licen*”).

² The attached hit reports show the break-down by custodian and search term.



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Unfortunately, in retrieving emails for the custodians requested by Plaintiffs, Defendants' counsel discovered that the West Virginia Office of Technology ("OT") did not preserve PST files for several custodians formerly employed by DHHR. Instead, they were automatically deleted 30 days after the termination of employment, which is OT's standard and automated practice for individuals leaving state employment. Some of these custodians were subject to a litigation hold, and Defendants are still attempting to determine why these files were not preserved.

- a. The custodians who were not subject to a litigation hold and whose PST files have been deleted are:
 - Laura Barno (left DHHR 4/01/22)
 - Bea Bailey (left DHHR 4/09/21)
 - Jolynn Marra (left DHHR 10/10/22)
 - Mischelle Williams (left DHHR 2/22/22)
 - Pam Holt (left DHHR 2/11/21)
 - Warren Keefer (left DHHR 12/31/22)
- b. The custodians who were subject to a litigation hold and whose PST files have been inadvertently deleted are:
 - Bill Crouch (left DHHR 12/30/22)
 - Jane McCallister (left DHHR 08/28/21)
 - Kevin Henson (left DHHR 10/23/20)
 - Tanny O'Connell (left DHHR 7/15/21)
 - Linda Watts (left DHHR 7/15/21)

All of these individuals in paragraph (b), plus Laura Barno, were identified as custodians for prior searches and Defendants have produced documents from these custodians, based on search terms proposed by Plaintiffs in 2020.

- c. Of the above, Defendants' counsel has partial PST files for the individuals in the chart below. Specifically, Defendants have the emails (and attachments) for the following custodians that included one or more of the search terms Plaintiffs proposed in 2020 for the following time periods, and Defendants have all emails sent to/from the following custodians to anyone still employed by DHHR:

Custodian	Time Period for Which Partial PST Files Available
Bill Crouch	01/01/2014 to 9/05/2020
Kevin Henson	01/01/2014 to 09/22/2020 (retired 10/23/20)
Laura Barno	01/01/2014 to 09/23/2020
Linda Watts	01/01/2014 to 09/22/2020
Tanny O'Connell	01/01/2014 to 09/01/2020

- d. It appears that Jeff Coben was not substituted as a custodian for Bill Crouch when he was appointed interim Secretary in December 2022. Dr. Coben's tenure as interim Secretary ended on July 4, 2023. Defendants do have all emails sent to/from Dr. Coben by anyone still employed by DHHR.



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Please be assured that Defendants' counsel are working with OT and DHHR to ensure that all potentially relevant documents are preserved moving forward, including PST files for individuals who leave DHHR. In addition, Defendants will answer any questions Plaintiffs may have about this issue and will consider any proposals Plaintiffs may have to mitigate any harm that Plaintiffs believe may have been caused by the non-preservation of certain emails.

2. Defendants' Compromise Proposal for ESI

Plaintiffs' proposed search terms and custodians are overbroad, unduly burdensome, and not proportional to the needs of the case, particularly given that they yield hundreds of thousands of documents and the fact that internal communication is of limited relevance to Plaintiffs' claims, which are about the legality of system-wide policies, not the Defendants' subjective intent or state of mind.

However, in the spirit of compromise, and in an effort to mitigate any issues arising from any non-preservation of emails, Defendants are willing to agree to produce all responsive, non-privileged documents created from January 1, 2019 through November 30, 2023, for **all of the search terms requested by Plaintiffs for 27 custodians listed on page 1** (though Defendants do not have complete PST files for five of these individuals, as set forth in paragraph (c) in Section 1):

Full PST Files Available

1. Allison Adler
2. Amy Hymes
3. Cammie Chapman³
4. Cindy Moore
5. Cree Lemasters
6. Cynthia Persily
7. Heather Grogg
8. Jeffrey Pack
9. Jeremiah Samples
10. Justin Davis
11. Kellie Littlefield
12. Lance Whaley
13. Laura Scarberry
14. Melanie Urquhart
15. Paula Ullom
16. Rae Bates
17. Rebecah Carson
18. Shaun Charles
19. Sherri Young
20. Susan Richards
21. Tina Mitchell
22. William Belcher

Limited PST Files Available (see par. (c) in Sec. 1)

23. Bill Crouch
24. Kevin Henson
25. Laura Barno
26. Linda Watts
27. Tanny O'Connell

³ Defendants only agree for Ms. Chapman to serve as a custodian for documents created on or after November 28, 2022, because Ms. Chapman was legal counsel prior to that date.



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With respect to the remaining 13 custodians proposed by Plaintiffs, Defendants will not produce ESI because:

- Governor Justice does not use email. The Governor's office email address is monitored and used by the Governor's constituent services staff, not the Governor.
- April Robertson (General Counsel), Jennifer Strickland (paralegal), and Wil Jones (Assistant Attorney General) – as well as Cammie Chapman prior to November 28, 2022 – are legal professionals in DHHR's Office of General Counsel or in the Office of the Attorney General.
- John Lopez is not part of the Bureau for Social Services and his job responsibilities have never been focused on child welfare.
- As explained in Section 1, Defendants do not have PST files for Bea Bailey, Jolynn Marra, Mischelle Williams, Pam Holt, or Warren Keefer, and these five individuals had limited or no involvement in system-wide child welfare policy or practice and were not identified as potential custodians by Plaintiffs in the first four years of this litigation.
- As explained in Section 1, Defendants do not have PST files for Jeff Coben or Jane McCallister.

Defendants' compromise proposal will result in Defendants gathering and reviewing over 700,000 documents (630,172 documents for 27 custodians described above, plus additional documents for search terms/custodians created in October or November 2023), **and Defendants believe it will result in the production of at least 500,000 documents to Plaintiffs.** Many of these will be emails sent by the custodians whose PST files were inadvertently deleted when those emails were sent to, received by, or copied to individuals who are still employed by DHHR.

To facilitate such an expansive production, Defendants will need to use "predictive coding" (sometimes referred to as "technology assisted review" or "TAR"), rather than manually reviewing all documents. This will require Defendants to: (1) stamp the overwhelming majority of ESI produced as "Confidential – Subject to Protective Order," because Defendants will not manually review all documents to determine if they in fact contain personal identifying information subject to the protective order; and (2) amend the clawback order to clarify the use of predictive coding constitutes "reasonable steps to prevent disclosure," such that Defendants can claw back privileged or confidential documents that are inadvertently produced.

Please let us know as soon as possible if Plaintiffs are amenable to this compromise proposal. If Plaintiffs confirm that they agree to this compromise proposal by October 13, 2023, Defendants will begin producing ESI by October 31, 2023 and expect to substantially complete production by December 1, 2023.⁴

⁴ It is not possible to produce documents created through November 30, 2023 by December 1, 2023. Accordingly, Defendants plan to complete the production of all documents created through August 30, 2023 by December 1, 2023, and then produce documents created from September 1, 2023 through November 30, 2023 in December 2023.



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Sincerely,

/s/ Philip J. Peisch

Philip J. Peisch

Attachments